STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICKEY DALE CORDELL,

Defendant-Appellant.

UNPUBLISHED
September 28, 2004

No. 249020
Macomb Circuit Court
LC No. 02-001124-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Mickey Dale Cordell appeals as of right his jury conviction of two counts of first-degree criminal sexual conduct[1] and his concurrent sentences of 180 months' to 25 years' imprisonment for sexually abusing his granddaughter. We affirm the conviction, but vacate the sentence and remand for resentencing.

I. Basic Facts And Procedural History

In 1999, Cordell moved in with his daughter and twelve-year-old granddaughter, the complainant, who shared a home in Warren. According to the complainant, Cordell began touching her breasts and inner thighs around the time she turned thirteen, and eventually engaged her in oral, digital, and penile/vaginal intercourse, in exchange for which he would buy her cigarettes and clothes. Cordell also bought her pornographic magazines. The complainant testified that Cordell sexually abused her several times a week over the course of approximately three years while her mother, Marissa Cordell, was at work or asleep. Cordell told the complainant that if she told anyone what he had been doing to her, he would be kicked out of the family or would kill himself.

After Marissa Cordell became aware that the complainant had missed two menstrual periods in late February 2002, she asked the complainant about her sexual activity, and the complainant told her mother that Cordell had sexually abused her. According to Marissa Cordell, when she told Cordell that they needed to talk about the complainant, Cordell immediately asked if the complainant was pregnant, and when Marissa Cordell told him that he might be the father, Cordell requested a DNA test. Marissa Cordell testified that Cordell told her

[1] MCL 750.520b(1)(b)(ii) (relationship).

the complainant had been "coming on to him" by "prancing around in her underwear," joining him in the shower, and masturbating in front of him. She testified that Cordell said the complainant had sex with him once, and that he had used a condom. Paula Lietzau, a friend of Marissa Cordell's who was present during this discussion, corroborated Marissa Cordell's account of the conversation at trial. Marissa Cordell asked Cordell to leave her home, which he did, and she filed a police report the following day.

Mark Anderson, who worked as a detective for the Warren Police Department, testified that Cordell came in to the police department lobby on March 1, 2002, looking "distressed." Anderson asked Cordell if there was anything he wanted to talk about, and, while escorting Cordell to the interviewing room, Anderson told him that he was not under arrest and was free to leave at any time. When they arrived at the interviewing room, Cordell told Anderson that he had sexual intercourse with his fifteen-year-old granddaughter on a couch in her home, and that he had worn a condom. Anderson testified that Cordell also alluded to engaging in other sexual activity with the complainant. After consulting briefly with his supervisor, Anderson placed Cordell under arrest.

Cordell chose not to testify at trial. His defense was based on the theory, developed during cross-examination of the complainant, that her testimony was unreliable, as indicated by inconsistencies regarding when the abuse began and her claim that Cordell gave her a particular pornographic magazine several months before the date on the cover of the magazine. During the prosecutor's closing argument, he characterized the issue regarding the date of the magazine as a "red herring," and stated that defense counsel was using the issue to "muddy [the] water." After defense counsel addressed the magazine issue during his closing argument, the prosecutor reminded the jury in his rebuttal argument that the magazine was not an element of the crime, and also told them that it was the job of the "seasoned defense attorney" to "try to get [the complainant] confused," and to "lead [a witness] down a path and then try to get them to answer the question the way that you want to."

The jury found Cordell guilty of two counts of first-degree CSC, and the trial court sentenced him to 180 months' to 25 years' imprisonment.

II. Prosecutorial Misconduct

A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.[2] Because Cordell did not object to the challenged remarks, we will reverse only for plain error, placing the burden on defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.[3]

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[2] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[3] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

B. Denigration Of Defense Counsel

During closing argument, the prosecutor told the jury that the discrepancy about the date of the magazine was a "red herring," and stated that defense counsel was using the issue to "muddy [the] water." The prosecutor also stated that it was the job of the "seasoned defense attorney" to "try to get [the complainant] confused," and to "lead [a witness] down a path and then try to get them to answer the question the way that you want to." Cordell argues that these comments improperly denigrated defense counsel and denied him a fair trial.

Although "prosecutors are accorded great latitude regarding their arguments and conduct,"[4] a prosecutor may not denigrate defense counsel[5] or suggest that defense counsel is intentionally attempting to mislead the jury.[6] This Court has held that a prosecutor's comments characterizing the defense theory as misleading may warrant reversal.[7]

In our view, the prosecutor's characterization of the magazine issue as a "red herring" was not an inappropriate denigration of defense counsel's veracity, but rather a permissible comment that a piece of evidence was not germane to the central issues in the case. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.[8] While we find the remainder of the challenged statements more troubling, we conclude that any prejudice arising from these statements was cured by the trial court's instruction that the attorneys' statements and arguments were not evidence.[9] Moreover, in light of the undisputed testimony that Cordell admitted to both his daughter and the police that he had sexually abused the complainant, any error that occurred was not outcome determinative and does not require reversal.[10]

III. Jury Instructions

A. Standard Of Review

We review claims of instructional error de novo.[11]

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[4] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).

[5] *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

[6] *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

[7] See *People v Dalessandro*, 165 Mich App 569, 578-580; 419 NW2d 609 (1988).

[8] See *Bahoda*, *supra* at 282.

[9] *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

[10] See *Aldrich*, *supra* at 110; *Carines*, *supra* at 752-753, 764.

[11] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

B. Waiver

On appeal, Cordell makes the counterintuitive argument that the trial court erred in failing to instruct the jury that the complainant's prior inconsistent statements could be used for impeachment purposes only. Specifically, Cordell makes the dubious assertion that because the trial court did not instruct the jury that it could only consider the complainant's prior inconsistent statements for impeachment purposes, the jury, "being made up of lay individuals not schooled in the intricacies of the law, may very well have taken the lack of any instruction in this regard to mean that the prior inconsistent statement and testimony of [the complainant] could not be used in any fashion."

While we note that it strikes us as entirely more likely that a limiting instruction of the type Cordell proposed would have redounded to the benefit of the prosecution, it is not necessary for us to reach the merits of Cordell's argument. Cordell never requested that the trial court give the instruction at issue, and he did not include it in the list of proposed instructions he submitted to the trial court. After the trial court read the list of proposed instructions into the record, both parties stated that they agreed to those instructions. This expression of satisfaction with the jury instructions waived any claim of error.[12]

IV. Sentencing

A. Standard Of Review

We review de novo questions requiring interpretation of the statutory sentencing guidelines.[13] We review the trial court's determination of the existence of a sentencing factor for clear error, and we will uphold those scoring decisions that are supported by any evidence in the record.[14]

Cordell argues that the trial court erroneously scored twenty-five points for OV 11,[15] and that this error resulted in a sentence that was outside the proper guidelines range. However, Cordell did not raise this issue at the sentencing hearing or in a proper motion for resentencing. Although Cordell filed a motion to remand in this Court, it was untimely, and therefore was not a "proper motion for remand" as required to preserve the issue for appeal.[16] Accordingly, our review is for plain error that affected defendant's substantial rights.[17]

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[12] See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

[13] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[14] *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[15] MCL 777.41(1)(b).

[16] See MCL 769.34(10).

[17] *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

B. OV 11

Cordell argues that the trial court was required to score a separate sentencing information report for each of the two counts of CSC I for which he was convicted, and that because OV 11 directs the trial court not to score the one penetration that formed the basis of the CSC I conviction, OV 11 should have been scored at zero for both counts. Cordell also points out that OV 11 only allows the scoring of those sexual penetrations that arise out of the sentencing offense. Because neither penetration for which Cordell was convicted arose out of the other, we agree that OV 11 was improperly scored, and we conclude that this plain error requires a remand for resentencing.

Cordell bases his argument on the notion that the trial court erred in failing to prepare a separate SIR for each conviction. However, this failure does not itself constitute plain error affecting Cordell's substantial rights. By statute, a separate SIR must be prepared for "each conviction for which a consecutive sentence is authorized or required"[18] or, otherwise, for each crime of the highest class that will determine the minimum sentence range.[19] In this case, Cordell was convicted of two counts of CSC I, and received identical *concurrent* sentences for each conviction. Thus, the error of which Cordell complains did not stem from the trial court's failure to score separate SIRs for each conviction. Rather, it stemmed from the trial court's incorrect application of the statutory scoring requirements.

As noted, the scoring instructions for OV 11 indicate that the sentencing court should "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense,"[20] but should not score points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." The statute does not define the phrase "arising out of." In applying this provision to a case involving multiple sexual penetrations that occurred during the course of a kidnapping, this Court relied on the general definition of "arise" to conclude that MCL 777.41(2)(a) "suggests that sexual penetration of the victim must result or spring from the sentencing offense."[21] The Court applied this definition to hold that three sexual penetrations "arose out of" the sentencing offense where all three penetrations "occurred at the same place, under the same set of circumstances, and during the same course of conduct."[22]

In this case, the record indicated that Cordell engaged in various sexual activities with the complainant over the course of approximately three years. In our view, this time frame is simply too attenuated to conclude that the digital/vaginal penetration that formed the basis of one conviction "arose out of" the penile/vaginal penetration that formed the basis of the other

[18] MCL 771.14(2)(e)(i).

[19] See MCL 771(2)(e)(ii), (iii).

[20] MCL 777.41(2)(a).

[21] *People v Mutchie*, 251 Mich App 273, 276; 650 NW2d 733 (2002), aff'd in part on other grounds 468 Mich 50 (2003).

[22] *Id*. at 277. See also *McLaughlin*, *supra* at 674 ("'arising out of' the sentencing offense refers to all penetrations arising out of the entire assault").

conviction, or vice versa. The fact that OV 11 explicitly contemplates that "[m]ultiple sexual penetrations of the victim by the offender *extending beyond the sentencing offense*"[23] would be scored as part of OV 12 or OV 13 supports this interpretation. Accordingly, we conclude that there was no evidence to support the scoring of OV 11. Because subtracting twenty-five points from Cordell's score would change his minimum sentence guidelines, this error affected Cordell's substantial rights, and we therefore remand for resentencing.

We affirm the conviction, vacate the sentence, and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

[23] MCL 777.41(2)(b) (emphasis added).